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Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

October Term, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Illinois Central Gulf Railroad Company ("ICG"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 615 F.2d 470. The opinion of the District Court for the Eastern District of Missouri is reported at 468 F. Supp. 615.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 4, 1980. A timely Petition for Rehearing En Banc was denied on the 5th day of March, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In a suit under Title 49, United States Code, Section 20(11), the Carmack Amendment, how does the shipper discharge its burden of proving that the cargo was delivered to the carrier in good condition when the carrier does not participate in the loading and has no opportunity to inspect the cargo before issuing its bill of lading, and when there is evidence of possible causes of damage existing before the cargo was delivered to the carrier?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ 20(11). Any common carrier . . . subject to the provisions of this chapter receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States . . .

* * *

Any common carrier, . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, . . . to which such property may be delivered or over whose line or lines such property may pass within the United States . . .

(Revised and Codified, October 17, 1978, as 49 U.S.C. § 11707.)

STATEMENT OF THE CASE

This case concerns the fate of a shipment of bauxite ore, a highly contaminable commodity, transported by ship from the mine in Guyana, South America, to the bulk commodities port in Mobile, Alabama.[1] The importer for Kaiser was Philipp Brothers which was designated as shipper on the bill of lading. From Mobile the ore was transported over petitioner's railroad in hopper cars to Kaiser's plant in Mexico, Missouri, where Kaiser rejected twelve railcars of ore on account of alleged contamination. Although many individuals handled or observed the ore at various times, there was no testimony to establish the source of contamination or exactly how many cars actually contained a contaminant.

Kaiser attempted to establish circumstantially that the ore in question became contaminated while in the custody of the ICG as a result of the railroad's failure to remove all residue of the preceding load from each railcar used to transport the ore. There was no direct evidence as to the condition of the ore at the time it was delivered to the railroad, but Kaiser did adduce the following evidence on that issue: (1) bills of lading reciting receipt of the ore in "apparent good order"; (2) deposition testimony of the shipper's agent, Stanley Malabud, who observed the ship being unloaded; (3) deposition testimony of dock employees about precautions they took to prevent contamination of bauxite ore.[2]

To refute Kaiser's claim of delivery in good condition, the ICG went forward with evidence of other possible

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1. The shipment was made in interstate commerce and original federal jurisdiction of the suit is pursuant to 28 U.S.C. 1337.

2. Kaiser also offered a Certificate of Analysis of a sample of bauxite ore prepared in Guyana, South America. The district court admitted it into evidence as a business record but accorded it no probative value on the delivery issue. The Court of Appeals concluded this finding was not clearly erroneous.

sources of contamination, focusing particularly on the unprecedented handling of the ore in question; i.e., after unloading from the ship but before delivery to petitioner it was stored at Mobile outdoors on a concrete pad for almost two weeks within 200 feet of iron ore, the principal contaminant.[3] In addition, evidence was presented that the preceding loads of all but two of the rejected cars was not iron ore; in fact, two of the rejected cars had carried calcined refractory grade bauxite ore on the immediately preceding load.

In addition, the evidence established a unique division of responsibilities at the Port of Mobile between shippers, dock employees and the railroad, which bears on the ICG's lack of opportunity to inspect cargo before issuing its bill of lading. The entire dock and storage area, together with all equipment used in unloading, storing and reloading the bauxite, are wholly owned, controlled and operated by the Alabama State Dock, a public agency of the State of Alabama. Dock employees perform all the procedures incident to handling, storing and loading the commodities. ICG is not permitted by the State Dock to control or participate in this operation.

The ICG delivers empty cars to dock employees at a location one mile from where the ore is loaded. Railroad representatives do not accompany the cars to the loading site; they are not present and do not participate in any

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3. A total of twelve cars were rejected by Kaiser as contaminated. One of these was a closed top hopper car rejected for tripoli contamination. This car had been loaded directly from the ship without intervening ground storage, and it had been personally inspected by the shipper's agent, Stanley Malabud, who apparently found it clean and suitable for transporting bauxite ore. The remaining eleven cars were open hoppers containing the ore that had been ground stored. Only eight of these actually were unloaded at destination, and iron ore contamination was observed in at least some of these. Three were not unloaded at all, but they were rejected as contaminated even though three Kaiser employees made a topside inspection and observed no evidence of contamination.

way in the actual loading operation. Dock employees load and weigh the cars and return them to the railroad at the same location. It is not until the loaded cars have been returned to the ICG that the bill of lading is prepared and issued.

On March 20, 1979, after a two-day trial, the district court entered judgment in favor of Kaiser for only the salvage proceeds of the ore. The basis of the trial court's holding was:

> Although the matter is not free from doubt, we hold that trier of fact could find that plaintiff made a prima facie case [of delivery in good condition] . . . . In our judgment, however, the overwhelming weight of the evidence negatives the verity of this weak prima facie showing. *We find that plaintiff has not established by the preponderance of the evidence that the bauxite ore in question was in an uncontaminated condition when delivered to defendant.* 468 F. Supp. 615, 618 (E.D. Mo. 1979). (Emphasis added.)

Kaiser appealed, but the ICG did not, consistent with its position that Kaiser was entitled to the salvage proceeds of the ore in full satisfaction of its claim.

On March 5, 1980, the United States Court of Appeals for the Eighth Circuit, rejecting the district court's factual findings, held that Kaiser had established all elements of a *prima facie* case, including delivery in good condition, and that the ICG was liable under the Carmack Amendment. The Court reversed the judgment of the district court and remanded the cause solely for a determination of damages.[4]

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4. Because of its ruling on the delivery issue, the district court never reached the ICG's ultimate defense: even if Kaiser had established a *prima facie* case, the railroad was relieved of

(Continued on following page)

REASONS FOR GRANTING WRIT

1. The Decision Below Raises Important Questions of Federal Law Which This Court Did Not Resolve in Its Last Decision in This Area and Which Present a Logical Sequel to That Decision.

This Court last addressed the subject of shipper claims against carriers for damage to goods in transit in its landmark decision in *Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134 (1964). There this Court held that a shipper establishes a *prima facie* case of liability if it proves: (1) the cargo was delivered to the carrier in good condition; (2) the cargo reached its destination in damaged condition; and (3) the extent of damages actually sustained. If all three elements are established, then the burden of proof shifts to the carrier to demonstrate its freedom from negligence and that the damage resulted from one of the causes for which a carrier is not responsible. But *Elmore* left unanswered many questions concerning the element of delivery in good condition, which had been conceded in that case. Here the issue of delivery in good condition was sharply contested below, and a substantial part of the evidence adduced at trial bore on the question of whether Kaiser had proved that the ore was in good condition when it was delivered to the ICG.

Footnote continued—
liability because of its reliance on the shipper's custom and practice of substituting its judgment for that of the railroad in selecting cars suitable for transporting bauxite ore. The Eighth Circuit apparently has resolved that issue on the merits against the railroad as an original matter, for the only subject remanded to the district court is a determination of damages. Moreover, the Court virtually mandated that the district court compute damages on the basis of twelve carloads of ore, thereby rejecting express findings that at most only four cars contained contamination, and three cars were found by three Kaiser employees to have no evidence of contamination.

Petitioner contended, and the trial court found, that Kaiser had failed to prove delivery in good condition. Although Kaiser had presented circumstantial evidence of delivery in good condition, the ICG adduced evidence pointing to other possible sources of contamination from which it could be inferred that the contamination occurred *before* the ore was delivered to the railroad for transportation. It was the ICG's position, and the trial court found, that Kaiser failed to prove delivery in good condition, an element essential to a *prima facie* case of liability. Contrary to the opinion of the Eighth Circuit, therefore, the burden of proof never shifted to the ICG to demonstrate its freedom from negligence and that the damage resulted from a cause for which the railroad was not liable.

In reversing the district court, the Court of Appeals relied principally upon the recital in the bills of lading that the ore was received "in apparent good order, except as noted (contents and condition of contents of packages unknown)." The ICG did not note any other exceptions on the bills of lading. The only other evidence of delivery in good condition was deposition testimony of the shipper's agent and dock employees concerning the precautions they took against contamination while the ore was being unloaded from the ship and placed in ground storage.

There was no evidence bearing on the condition of the ore during the intervening two weeks when it was stored outside on a concrete pad within 200 feet of iron ore, the principal contaminant. There was no direct evidence concerning the condition of the ore at the time it was actually loaded in the railcars and delivered to the carrier. Although the ICG did not participate in the loading of the ore and had no opportunity to inspect it in the loaded hopper cars prior to issuing the bills of lading, the Court

of Appeals held that ICG was "negligent" in issuing the bills of lading with no exceptions noted.

The questions to be resolved herein are present in all shipper-carrier suits where delivery in good condition is not conceded, and they comprise a logical and necessary sequel to this Court's decision in *Elmore*. There, this Court held that the shipper must prove delivery of the cargo in good condition but did not address *how* the shipper discharges that burden:

1. Must the shipper exclude pre-delivery cases of damage?

2. Must the shipper adduce direct evidence of the condition of the cargo at the time it is delivered to the carrier?

3. Is the statutorily prescribed recital in the bill of lading of receipt in apparent good order sufficient when supported only by remote, circumstantial evidence of the condition of the cargo several days before it was delivered to the carrier?

As a common carrier, petitioner has a statutory duty to provide transportation to shippers. 49 U.S.C. § 1(4); cf. *Brotherhood of Ry. & S.S. Clerks, etc. v. Florida East Coast Ry. Co.*, 384 U.S. 238 (1966). It may decline to receive cargo for shipment only "in the exigencies of safeguarding life and property. . .". *United States v. Pryba*, 502 F. 2d 391, 399 (D.C. Cir. 1974). The carrier must transport the cargo whether it can inspect the goods for condition or not. Once a carrier has accepted the cargo for transportation, the law imposes a substantial liability with narrowly prescribed exceptions based on the premise that the carrier has peculiarly within its knowledge the facts and circumstances that may relieve it of liability. The shipper's burden of proof on the element of delivery in good con-

dition should be no less onerous, for to paraphrase *Elmore & Stahl*: before delivery to the carrier, it is the *shipper*, not the carrier, which has "peculiarly within its knowledge all the facts and circumstances on which it may rely" to establish the condition of the cargo.

In this case, the contamination had to occur in one of two ways: either the contaminant was in the ore before it was delivered to the ICG, or residue from preceding loads in the hopper cars contaminated the ore. Because of the weight the Eighth Circuit accorded the bills of lading, the Court effectively imposed upon the carrier, not the shipper, the burden of proving which occurred. This holding not only conflicts with those of this Court and several Courts of Appeals, but it also contravenes the plain meaning of 49 U.S.C. § 101, which provides in relevant part:

> When . . . bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement . . . that the goods are said to be goods of a certain kind or quantity, or in a certain condition . . . such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not . . . of the kind or quantity or in the condition they were said to be by the consignor.

That the bills of lading recite that goods described as "RASC calcined bauxite ore" were received in "apparent good order" does not render the ICG liable when, as here, the *shipper* loaded the ore. The patent intent of 49 U.S.C. § 101 is to protect carriers from the binding effect of the shipper's description of cargo which the carrier could not inspect before accepting it for carriage.

To hold otherwise is to compel carriers to conduct costly and time consuming inspections of all cargo loaded by shippers; it could necessitate unloading, inspecting and reloading cargo, all before issuing the bill of lading. More-

over, carriers would be compelled to provide inspectors with a wide range of technical expertise to accommodate the infinite variety of products shipped in interstate commerce. Because shippers load most goods transported by common carriers, as a matter of policy it is shippers, who already possess the requisite expertise and who load their own products, who should be required to account for the condition of cargo until it is delivered to the carrier for transportation.

The issues to be decided in this case will have a substantial 'economic impact on interstate shippers and carriers alike. In 1964 when *Elmore* was decided, rail carriers paid slightly more than $145,500,000 to shippers for freight claims. In 1978 (the most recent data available), rail carriers paid shippers in excess of $300,000,000 for those claims, an increase of 109 percent. Claim payments on bulk cargo alone, such as bauxite ore, exceeded $22,000,000 in 1978. During the same period of time ton mile revenue increased by only 30 percent, and the railroads' collective rate of return on investment shrunk from 3.16 to 1.62 percent.

The impact of these issues on the ICG also is substantial. In 1964 the ICG had net revenue from freight hauling of just over $18,000,000 and paid freight claims of $5.1 million. By comparison, in 1978 the ICG's net revenue from freight hauling was $2.5 million, and it paid freight claims of $9.7 million. Thus, its net revenues are down 86 percent, and freight claims paid are up 90 percent.[5]

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5. Economic data for the railroad industry was obtained from annual reports of the Freight Claim Damage Prevention Division of the American Association of Railroads and from the 1979 Yearbook of Railroad Facts published by the American Association of Railroads. ICG economic data was obtained from ICG annual reports.

For the reasons discussed above, this case provides an opportunity for this Court to resolve important questions concerning how a shipper sustains its burden of proof on an essential element of its cause of action against a carrier for damage to cargo transported in interstate commerce. A definitive ruling on the questions presented will aid shippers, carriers and the judiciary alike.

2. The Decision Below Conflicts With an Early Decision of This Court and Those of Several Courts of Appeals As to How a Shipper Discharges Its Burden of Proof on the Issue of Delivery in Good Condition.

In contrast with the decision of the Eighth Circuit below, this Court and the Courts of Appeals for the Second, Third, Sixth, Seventh and District of Columbia Circuits would have required *direct* evidence of the condition of the ore at the time it was delivered to the railroad under the circumstances of this case. Kaiser adduced no direct evidence as to the condition of the ore at the time it was delivered to the railroad for carriage. Of the circumstantial evidence adduced by Kaiser on the issue of delivery in good condition,[6] only the bills of lading are closely related in time to delivery of the ore to the railroad. The observations of Stanley Malabud and the dock employees end with the placement of the ore outdoors on a concrete pad within 200 feet of iron ore, the principal contaminant. Although the ore remained there for almost two weeks before it was loaded by dock employees into railcars and delivered to the railroad for transportation, the next witnesses to observe the condition of the ore were Kaiser employees at destination.

In rejecting the district court's finding that Kaiser failed to prove delivery in good condition, the Eighth Cir-

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6. That evidence was: (1) bills of lading reciting receipt in apparent good order; (2) deposition of Stanley Malabud who observed the ship being unloaded; and (3) depositions of dock employees about their precautions to prevent contamination of bauxite ore.

cuit relied principally on the bills of lading, which recited receipt of the ore in apparent good order. Despite the ICG's inability to inspect the cargo occasioned by the loading procedures described at pages 4-5, *supra*, the Court expressly rejected the ICG's contention that the bills of lading were insufficient to establish delivery in good condition.

Without specifying how, the Court of Appeals stated that the ICG had "ample opportunity to inspect the goods" or "to note that it was unable to ascertain their condition." 615 F.2d at 475-476. In fact, the bills of lading *do* note that the ICG was unable to ascertain the condition of the ore. As prescribed by statute, 49 U.S.C. § 101, the bills of lading recite: "Received . . . in apparent good order, except as noted (contents and condition of contents of packages unknown). . . ." As applied to a bulk commodity loaded by the shipper, this recital can only mean that the surface appears to be in good order, but the condition of the rest, which is not visible and open to inspection, is unknown. A careful inspection of the eleven open hopper cars would have revealed only the top layer of a commodity that looks like gravel. Even the Court of Appeals found that without technical training or experience, it would be "difficult to detect" the presence of iron ore mixed in bauxite ore.[7] 615 F.2d at 475, n. 6. Indeed, three Kaiser employees who deal with bauxite ore on a daily basis observed no evidence of contamination when they conducted topside inspections of three open hoppers at destination.[8]

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7. The twelfth rejected car contained a white contaminant which the Court of Appeals opined would be easy to detect. That car was loaded from the ship directly into a *closed* top hopper car which had been personally inspected and approved by Stanley Malabud, the shipper's agent.

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8. Although there is accordingly no evidence of damage to the ore in these cars, the Court of Appeals has directed the district court to include them in the damage computation because

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Implicit in the Court of Appeals' discussion of the bill of lading is the conclusion that the recital therein, supported only by remote, circumstantial evidence, is conclusive and binding upon the carrier even when: (1) there is evidence of other possible causes of damage preceding delivery to the carrier which could not have been detected by the carrier at the time of delivery; and (2) there is no direct evidence of the condition of the cargo at the time it is delivered to the carrier. In these respects the Eighth Circuit's holding conflicts with an early decision of this Court and those of several Courts of Appeals.

In *Clark v. Barnwell,* 12 How. 272, 53 U.S. 272 (1851), this Court considered the effect of a similar recital. There, like here, the bill of lading recited that the goods were shipped in good order and stated in addition, "contents unknown". This Court found it obvious that the recital pertained only to the external condition of the cargo and then stated:

> . . . if the evidence on the part of the defense [the carrier] laid a foundation for a reasonable inference, that the damage resulted from an imperfection in the goods when packed in the cases, *or had occurred previously to their being shipped on board,* the burden was thrown upon the libelants [shippers] to rebut the inference. *Id.* at pp. 283-284. (Emphasis added.)

In contrast with the holding of the Eighth Circuit below, the following decisions of the Second, Third, Sixth, Seventh and District of Columbia Circuits stand for the

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Footnote continued—
the ICG consented to their not being unloaded. The record establishes that the ICG did so only because Kaiser had already rejected the cars for contamination and that the ICG would *not* have done so if it had *known* that there was no evidence of contamination. 615 F.2d at 479.

proposition that remote, circumstantial evidence of condition and the recital in a bill of lading of receipt in good order are not sufficient to establish delivery in good condition when: (1) there is evidence of other possible causes of damage existing prior to delivery to the carrier; (2) there is no adequate means or opportunity for the carrier to inspect the cargo; or (3) the cargo is delivered under seal. In such circumstances these courts hold the shipper must *exclude* other possible causes of damage; it is not the carrier's burden to *prove* that the cargo was damaged prior to delivery.

In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 313 F. 2d 864 (7th Cir. 1963), and *Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island & Pacific Railroad Co.*, 311 F. 2d 493 (7th Cir. 1963), the Seventh Circuit held that the recital in a bill of lading of receipt in apparent good order was insufficient to prove delivery in good condition. *Harris, supra,* concerned a shipment by trailer of frozen sausage which was rejected at destination because the odor indicated spoilage. To prove delivery in good condition the shipper had presented not only the bill of lading, but also testimony concerning the following: (1) the manufacturing procedures for the sausage; (2) freezing procedures which were performed immediately after manufacture; (3) the solid frozen state and temperature of the sausage when delivered to the carrier; and (4) the condition of the sausage at destination, which was attributable to thawing and refreezing.

Despite this evidence, the court reversed the district court's judgment in favor of the shipper, holding that the shipper did not prove delivery in good condition because it had not demonstrated that the condition which prompted rejection of the sausage was *not* present when

the cargo was delivered to the carrier. Thus, it was the shipper's burden to *exclude* possible causes of damage that might have occurred before the cargo was delivered to the carrier. (The opinion nowhere stated that the shipment in question was under seal.)

Similarly, in *Armour, supra,* the Court held that the shipper's handling of the cargo before delivery to the carrier precluded a finding that the goods were undamaged when delivered to the carrier. To hold otherwise would be to subject the carrier to liability based merely on speculation and conjecture.

In *Blue Bird Food Products Co. v. Baltimore & Ohio R. Co.,* 492 F. 2d 1329 (3rd Cir. 1974), the Third Circuit found the bill of lading insufficient to establish delivery in good condition and required the shipper to adduce *direct* evidence of the condition of the cargo at the time it was delivered to the carrier. There, as here, the shipper argued that the carrier had an opportunity to inspect the cargo during the loading process or after the cargo was loaded but before seals were attached. Because a carrier does not assume responsibility for the goods until after they had been loaded, sealed and released by the shipper, the Court rejected this argument stating that the carrier is under no obligation to inspect the cargo prior to taking possession.

In *Ed Miniat, Inc. v. Baltimore & Ohio Railroad Co.,* 587 F. 2d 1277 (D.C. Cir. 1978), the Court of Appeals for the District of Columbia expressly relied upon the Third Circuit's decision in *Blue Bird Food Products Company, supra,* to hold that a shipper of beef was not entitled to recover from the carrier because it failed to prove delivery in good condition. In that case, forequarters of beef moved by "piggyback" trailers under bills of lading reciting receipt in "apparent good order." The cargo was rejected at destination for spoilage.

The trailers had been loaded and sealed by the shipper at its plant. To show that the beef had been packed in good condition, the shipper presented its record of incoming meat at its plant on the day the shipment in question was processed and testimony that an inspector of the United States Department of Agriculture supervised plant operations that day. The Court of Appeals held that the bills of lading, together with the plant records and the presence of the U.S.D.A. inspector, were insufficient to prove delivery of the meat to the carrier in good condition. The Court concluded that carriers have a fundamental right to have the shipper establish the elements forming the basis of liability, and to hold otherwise would be "to subject carriers to liability on the basis of no more than a mere possibility that they were responsible for damages to shipments." *Id.* at p. 1281.

In *Hoover Motor Express Co. v. United States*, 262 F. 2d 832 (6th Cir. 1959), the Sixth Circuit held that a bill of lading was evidence of good condition only as to whatever goods were visible and open to inspection. The bill of lading there, as in the instant case, recited receipt in "apparent good order . . . (contents and condition unknown)", which the Court characterized as an express limitation on the carrier's acknowledgement.

In *Ohio Galvinizing & Manufacturing Company v. Southern Pacific Company*, 39 F. 2d 840 (6th Cir. 1930), a case involving metal ice cans, the Sixth Circuit also held that the recital in the bill of lading of receipt in apparent good order was not sufficient to prove delivery in good condition because the carrier could make only a superficial inspection of the cans when they were unloaded from a steamship and reloaded into rail cars.

In *The Niel Maersk*, 91 F. 2d 932 (2d Cir. 1937), *cert. denied*, 302 U.S. 753 (1937), the Second Circuit reversed a

judgment for the shipper, despite evidence showing carrier negligence, for the sole reason that the shipper had failed to prove delivery in good condition. The Court held the bill of lading insufficient to establish the condition of the goods at delivery and properly observed that absent proof of delivery in good condition, questions concerning the limited exceptions to liability were not in issue. Citing *Schnell v. The Vallescura,* 293 U.S. 296 (1934), the Court acknowledged that the carrier bears the loss it cannot explain or bring within recognized exceptions to liability. However, the condition of goods when delivered to the carrier is *not* within the carrier's knowledge, and the carrier "should not have the burden of separating damages arising from causes prior to shipment from damages due to negligent stowage." *Id.* at pp. 934-935.

The liability of carriers prescribed in 49 U.S.C. § 20(11) is substantial; frequently it is characterized as that of an "insurer", comparable to *"res ipsa loquitur,"* or "absolute liability". Congress intended that shippers not be required to prove negligence on the part of a carrier for reasons well stated by this Court:

> The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge "[a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty . . ." *Missouri Pacific Railroad v. Elmore & Stahl, supra,* 377 U.S. at 143.

Requiring a shipper to prove by direct evidence an element essential to its *prima facie* case of liability does not subvert Congressional policy. And by analogy to *Elmore,* the burden of loss should be on the *shipper* when it cannot establish by a preponderance of the evidence that the cargo was delivered in good condition. Before cargo is delivered to the carrier, only the shipper "has peculiarly within its

knowledge all the facts and circumstances upon which it may rely" to establish the condition of the cargo. Permitting a shipper to establish delivery in good condition with less than direct evidence under the facts presented here improperly extends carrier liability beyond the scope intended by Congress.

The foregoing demonstrates that the opinion of the Eighth Circuit below conflicts with an early decision of this Court and those of several Courts of Appeals. The Eighth Circuit has permitted the shipper to prove delivery in good condition by: (1) the recital in the bill of lading of receipt in apparent good order; and (2) circumstantial evidence of precautions taken against contamination at a time remote from the actual loading and delivery of the ore. This evidence was held sufficient even though the ICG had no opportunity to inspect and ascertain the condition of the ore, and the evidence showed other possible causes of damage prior to delivery of the carrier. When those circumstances were present, the Second, Third, Sixth, Seventh and District of Columbia Circuits required shippers to prove more on the issue of delivery in good condition: in addition to the bill of lading, shippers were required to adduce *direct* evidence of the condition of the cargo at the time it was delivered to the carrier, and thereby exclude other possible causes of damage. This conflict justifies granting a Writ of Certiorari.

Moreover, the correctness of the decision below is open to serious challenge. The record clearly demonstrates, and the trial court found, that Kaiser did not prove that the ore was in an uncontaminated condition when delivered to the ICG and that at most only four of the twelve rejected cars contained contamination. The Eighth Circuit rejected those factual findings and unjustifiably conducted a *de novo* review of disputed facts, substituted its own judgment for that of the trier of fact, and resolved *sua sponte* the merits

of an issue never reached by the district court. FRCP 52(a); *McCaughn v. Real Estate Company,* 297 U.S. 606 (1936); *Blackhawk Hotels Co. v. Boufaey,* 227 F. 2d 232, 235 (8th Cir. 1955).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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